



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**23 CFR Part 771**

**Federal Transit Administration**

**49 CFR Part 622**

**[Docket No. FHWA–2013-0049]**

**FHWA RIN 2125-AF59**

**FTA RIN 2132-AB14**

**Environmental Impact and Related Procedures - Programmatic Agreements and Additional Categorical Exclusions**

**AGENCY:** Federal Highway Administration (FHWA), Federal Transit Administration (FTA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the FHWA and FTA joint procedures that implement the National Environmental Policy Act (NEPA) by adding new categorical exclusions (CE) for FHWA and FTA; allowing State departments of transportation (State DOT) to process certain CEs without FHWA's detailed project-by-project review and approval as long as the action meets specific constraints; and adding a new section on programmatic agreements between FHWA and State DOTs that allow State DOTs to apply FHWA CEs on FHWA's behalf, as described in section 1318 of the Moving Ahead for Progress in the 21st Century Act (MAP-21).

**DATES:** Effective on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** For the FHWA: Owen Lindauer, Ph.D., Office of Project Delivery and Environmental Review (HEPE), (202) 366-2655, or Jomar Maldonado, Office of the Chief Counsel (HCC), (202) 366-1373, Federal Highway Administration, 1200 New Jersey Ave., SE, Washington, DC 20590-0001. For the FTA: Megan Blum, Office of Planning and Environment (TPE), (202) 366-0463, or Nancy- Ellen Zusman, Office of Chief Counsel (TCC), (312) 353-2577. Office hours are from 8:00 a.m. to 4:30 p.m. e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**General Background**

On July 6, 2012, President Obama signed into law MAP-21 (Pub. L. 112-141, 126 Stat. 405), which contains new requirements that the FHWA and the FTA, hereafter referred to as the “Agencies,” must meet related to the NEPA (42 U.S.C. 4321 et seq.). The Agencies’ joint procedures at 23 CFR part 771 describe how the Agencies comply with NEPA and the Council on Environmental Quality (CEQ) regulations implementing NEPA; and include CEs that identify actions the Agencies have determined do not normally have the potential for significant environmental impacts and therefore do not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS), pursuant to 40 CFR 1508.4. Section 771.117 establishes CEs for FHWA actions and § 771.118 establishes CEs for FTA actions. Sections 771.117(c) and 771.118(c) establish specific lists of categories of actions, or “(c)-list” CEs, that the Agencies have determined normally do not individually or cumulatively have a significant effect on the human environment and do not require an EA or EIS. Sections

771.117(d) and 771.118(d) list examples of actions that may be categorically excluded from further NEPA review but require additional documentation demonstrating that the specific criteria for a CE are satisfied and that no significant environmental impacts will result from the action. The list of examples of actions that may be excluded as “(d)-list” CEs is not exclusive and the authority may be used for actions that are not included in the list of examples. Additionally, §§ 771.117 and 771.118 include the requirement for considering unusual circumstances, which is how the Agencies consider extraordinary circumstances, in accordance with the CEQ regulations. The presence of “unusual circumstances” requires that the Agencies “conduct appropriate environmental studies to determine if the CE classification is proper” pursuant to §§ 771.117(b) or 771.118(b). The potential for unusual circumstances for a project does not automatically trigger an EA or EIS. The FTA requires Agency approval for all CEs. The FHWA requires detailed project-by-project review and approval only for (d)-list CEs.

Section 1318 of MAP-21 requires the Secretary of Transportation to: (1) survey and publish the results of the use of CEs for transportation projects since 2005 and solicit requests for new CEs; (2) publish a notice of proposed rulemaking (NPRM) to propose new CEs received by the Secretary to the extent that the CEs meet the criteria for a CE under 40 CFR 1508.4 and 23 CFR part 771; and (3) issue an NPRM to move three actions found in 23 CFR 771.117(d)(1) through (3) to paragraph (c) to the extent that such movement complies with the criteria for a CE under 40 CFR 1508.4. In addition, section 1318(d) directs the Secretary to seek opportunities to enter into programmatic agreements, including agreements that would allow a State to determine, on behalf of

FHWA, whether a project is categorically excluded. The Agencies are carrying out this rulemaking on behalf of the Secretary.

This final rule contains a description of the notice of NPRM issued on September 19, 2013 (78 FR 57587), a summary of public comments received on that NPRM and responses to those comments, and a description of the final regulatory text at the end of this rule. Changes to the regulatory text not described in the summary and response to comments are described in the Section-by-Section Analysis. Following the Section-by-Section Analysis, this rule explains the various rulemaking requirements that apply and how they have been met.

### **Notice of Proposed Rulemaking**

On September 19, 2013, the Agencies published an NPRM proposing amendments to 23 CFR 771.117 and 771.118 as mandated by sections 1318 of MAP-21. The Agencies proposed to: (1) add four new CEs for FHWA and five new CEs for FTA, (2) allow FHWA to process CEs in § 771.117(d)(1) through (3) as (c)-list CEs when the action meets specified constraints, and (3) add a new section allowing programmatic agreements between FHWA and State DOTs to permit State DOTs to apply FHWA CEs on the Agency's behalf. The NPRM sought comments on how the Agencies proposed to interpret and implement the provision.

The public comment period closed on November 18, 2013. The Agencies considered all comments received when developing this final rule.

### **Summary of and Responses to Comments**

The Agencies received comments from a total of 30 entities, which included 12

State DOTs (Alaska, California, Colorado, Florida, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, Wyoming, and Washington), 6 transit and rail agencies (Los Angeles County Metropolitan Transportation Authority, Metropolitan Transportation Authority of New York, New Jersey Transit, San Francisco Bay Area Rapid Transit District, Southern California Regional Rail Authority, and Utah Transit Authority), 4 public interest groups (National Trust for Historic Preservation, Natural Resources Defense Council, Southern Environmental Law Center, and Transportation Transformation Group), 3 professional associations (American Association of State Highway and Transportation Officials, American Public Transportation Association, and American Road and Transportation Builders Association), 2 Federal agencies (U.S. Army Corps of Engineers and U.S. Department of the Interior), 1 Indian tribe (Osage Nation Historic Preservation Office), 1 regional transportation consortium (Alameda Corridor-East Construction Authority, Orange County Transportation Authority, San Bernardino Associated Governments, and Southern California Regional Rail Authority) and 1 anonymous comment. The majority of commenters suggested additional clarifications on the use of CEs, including expanding or limiting their scope. The comments submitted have been organized by theme or topic.

#### General

The FTA received 11 comments generally in support of the proposed rule change. Six of the comments provided overall support for all changes, while one comment specifically supported the new CEs added at § 771.118(c)(14), (15), and (16). Four comments supported the changes made to § 771.118(d), one of which offered additional

supporting information.

The FHWA received two comments that supported the consideration of programmatic CE agreements in § 771.117(g). Two comments supported the statement in the preamble that early acquisitions of rights-of-way under Section 108(d) may be approved as (d) list CEs. One comment supported the six conditional constraints in 771.117(e) to condition the move of (d)-listed CE actions to the (c)-list. The FHWA reviewed 109 comments on the new CEs, including the former (d)-list CEs moved to the (c)-list. Additionally, FHWA received 28 comments on programmatic agreements in § 771.117(g).

The FTA and FHWA appreciate the comments received on the proposed rule.

The FTA received a comment that suggested the numbering of the new CEs was incorrect. The numbering presented in the NPRM (i.e., the new CEs begin with § 771.118(c)(14)) is correct as FTA recently added two new CEs at § 771.118(12) and (13) through a separate rulemaking (see 79 FR 2107).

#### CE Development

Five State DOTs and two professional associations noted that only a handful of the new CEs proposed by transportation agencies were considered appropriate to include and additional effort should have been expended to identify more.

The Agencies are guided by their experience with CEs and considered the current administrative process for CE NEPA compliance. The Agencies also considered the survey results made public in the U.S. Department of Transportation National Environmental Policy Act Categorical Exclusion Survey Review

(<http://www.fhwa.dot.gov/map21/reports/sec1318report.cfm>). The FHWA evaluated the results of the CE survey to determine which requested actions would be appropriate as CEs according to the criteria for a CE under 40 CFR 1508.4 and 23 CFR 771.117(a). The FHWA did not pursue requests for new CEs for actions that would duplicate already existing CEs, requests for new CEs that would not involve a FHWA action (e.g., projects ineligible for FHWA funding assistance), requests that would not meet the criteria for a CE under 40 CFR 1508.4 and 23 CFR 771.117(a), or requests for new CEs for actions that would not have independent utility. The FHWA also eliminated proposed new CEs that would be covered by a statutorily mandated CE rulemaking under other MAP-21 provisions (e.g., emergency actions (section 1315), operational right-of-way actions (section 1316), limited Federal assistance actions (section 1317), and the revision mandated by section 1318(c) for moving modernization of highways actions, highway safety actions, and bridge rehabilitation, reconstruction, or replacement actions from the (d)-list to the (c)-list)). The FHWA evaluated the remaining actions proposed as CEs to eliminate those that did not meet the 40 CFR 1508.4 definition and those that were so broad that they could include actions with significant environmental effects. The FHWA determined that 13 requests of a total of 86 were appropriate for consideration. These 13 requests were grouped into 5 CEs. Four of the five CEs could be substantiated as new CEs. No additional information was provided during the comment period to substantiate new CEs.

One professional association asked the Agencies to involve the regulated community as new CEs are developed. The commenter requested the Agencies to use

stakeholder meetings as a forum to discuss the creation and implementation of CEs.

The Agencies have involved State DOTs, transit authorities, metropolitan planning organizations, and other governmental agencies in the development of the new CEs in this rule. For example, the Agencies' new CEs created in this final rule are a direct response to the requests received for new CEs under the section 1318(a) survey process. The Agencies also relied on the public notification and comment process required in the rulemaking process, 40 CFR 1507.3, and the CEQ's guidance "Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act" (75 FR 75628). The Agencies will provide outreach and training to their stakeholders such as State DOTs and transit agencies to ensure the appropriate implementation of the CEs. The FHWA is not planning to provide training to the public but FTA will be hosting a public Webinar that focuses on FTA's portion of the rule.

#### Environmental Review Process Efficiency

Three State DOTs and one professional association expressed concern that the NPRM proposed little to help expedite project delivery and did not fully embrace flexibilities emphasized in MAP-21. Two State DOTs and one professional association indicated that the proposed rule was overly prescriptive and could limit States' flexibility. Two transit agencies and one professional association indicated that the rule will save time and costs and streamline the environmental review process. One State DOT and one professional association suggested re-writing the rule in a manner that is consistent with congressional intent to streamline process and reduce cost, and remove language that is



not specifically required for compliance with the statute. One professional association stated that all newly created CEs must be implemented in a programmatic fashion, with no further agency review. A federally recognized Tribe indicated that a shortened review period for evaluation of highway projects may cause tribal governments hardship.

The Agencies have undertaken various initiatives that are consistent with the mandates in MAP-21 to expedite project delivery and reduce project costs. These include flexibilities developed through FHWA's Every Day Counts initiative (<http://www.fhwa.dot.gov/everydaycounts>), FHWA and State DOTs' revisions and refinements of programmatic CE (PCE) agreements to process projects qualifying for CEs, and FTA's creation of its list of CEs (78 FR 8964). The Agencies also revised their lists of CEs to include new CEs pursuant to MAP-21 Sections 1315 (78 FR 11593), 1316, and 1317 (79 FR 2107), which provide further flexibility to the environmental review process, expedite project delivery, and reduce project costs. This rulemaking continues the Agencies implementation of the MAP-21 provisions to ensure efficient and effective planning. The Agencies have relied on their experience implementing NEPA for surface transportation projects and their experience in using tools to implement this review process efficiently (e.g., FHWA is relying on its 25-year experience of using PCE agreements as a tool to expedite the NEPA review processes (see FHWA's 1989 PCE Memorandum)). The Agencies determined that the language adopted in this final rule appropriately balanced the goal of providing flexibility and expeditious project delivery with the need to satisfy the Agencies' environmental review requirements and responsibilities. The Agencies must continue to meet their legal obligations for a project

even if the project qualifies for a CE, which includes the Agencies' responsibilities to consult with Tribes.

The U.S. Army Corps of Engineers (USACE) noted that Nationwide Permit 23 (NWP 23)—the Clean Water Act (CWA) section 404 Nationwide Permit for actions that qualify for CEs approved by the USACE—is an example of efficient regulatory review consistent with the goals of MAP-21. The USACE noted that it had previously approved FHWA CEs for this purpose but has not approved the new FHWA CEs or any of the FTA's CEs for use with NWP 23. As a result, those FHWA CEs moved from the (d)-list to the (c)-list would continue to require submittal of a pre-construction notification. Lastly, USACE noted that if FTA would like their CEs to be covered under the permit, FTA would need to request USACE review and receive approval prior to using any of its CEs with NWP 23.

The Agencies agree that until the USACE approves the new CEs for use under NWP 23, the CEs could not be used to meet NWP 23 and a pre-construction notification would be needed. The FTA understands that its categorically excluded actions under § 771.118 are not currently covered under the USACE NWP 23. The FTA has formally requested that USACE review FTA's CEs in order to utilize NWP 23 and FTA will communicate with the USACE further concerning the application of NWP 23 to FTA actions.

#### Other Requirements

One federally recognized Tribe indicated that the exemption from further review and permit requirements for a project did not eliminate the need for establishing the area

of potential effect for that project under section 106 of the National Historic Preservation Act (NHPA), particularly for projects in areas that have not been previously surveyed. The Tribe indicated that historic preservation requirements under section 106 of NHPA are considered satisfied if treatment has been agreed upon in a memorandum of agreement but there was no provision to ensure that federally recognized tribes are included in the development of the agreement. The Tribe commented that the new rulemaking may authorize a State to use State review and approval laws and procedures in lieu of Federal laws and regulations, which has the potential to significantly worsen consistency issues.

Requirements under other Federal and State laws and regulations still apply, such as the CWA, Clean Air Act, NHPA, General Bridge Act of 1946, and Endangered Species Act (ESA). In the case of projects affecting historic properties (which includes properties of religious and cultural significance for Tribes that are listed on or eligible for the National Register), the Agencies must follow the section 106 procedures outlined in 36 CFR part 800. This includes the initiation of the section 106 process (identifying the parties such as federally recognized Tribes), identification of historic properties (including defining the area of potential effect), evaluation of effects, and resolution of adverse effects. The final rule does not authorize a State to use or rely on State environmental review and approval laws in lieu of the Federal environmental requirements.

The U.S. Department of the Interior (DOI) indicated that it transfers surplus Federal lands and buildings to State and local agencies for parks and recreation use in

perpetuity, and these transfers include deeds with perpetual use requirements and perpetual Federal agency oversight. The DOI expressed concern that with the rulemaking the States might overlook consultation with DOI in situations where property at issue was acquired through DOI and the deed contained perpetual use requirements.

The Agencies emphasize that the rule does not exempt a project that qualifies for a CE from compliance with all other requirements applicable to the action. The CE determination does not exempt a State from consultation requirements with the appropriate Federal land management agency if the project involves a property that has perpetual use requirements imposed by the Federal land management agency.

#### Documentation

Five State DOTs, one regional transportation consortium, one professional association, one Federal agency, and one public interest group requested clarification in the final rule of the documentation necessary to ensure that the criteria for the CEs are satisfied. One professional association expressed concern that additional documentation beyond a project description is unnecessary. Two State DOTs expressed the opinion that some aspects of the NPRM will actually increase CE analysis and documentation. Two public interest groups appreciated the Agencies' reassertion that application of the new CEs must still take into account unusual circumstances. One public interest group suggested that any reduction in the documentation requirements, as advocated by a number of the State DOTs, would increase the potential for inconsistent and erroneous application of the new CEs. The public interest group urged the Agencies to actively monitor and audit the use of the CEs for the first few years to evaluate whether additional

guidance is necessary.

The final rule does not prescribe the specific amount of documentation needed to determine if a project qualifies for a CE or whether unusual circumstances exist such that additional environmental studies are needed to determine if the CE classification is proper. It is important to note that all projects that qualify for CE determinations require the consideration of unusual circumstances. Unusual circumstances include substantial controversy on environmental grounds or significant impacts on properties protected by section 4(f) of the Department of Transportation Act (23 U.S.C. 138 and 49 U.S.C. 303) or section 106 of the NHPA, or inconsistencies with any Federal, State, or local law, requirement or administrative determination relating to the environmental aspects of the action (23 CFR 771.117(b); 23 CFR 771.118(b)). This list of unusual circumstances is not all-inclusive and the finding that there are unusual circumstances will depend on the context of the project. For example, the presence of listed species or critical habitat designated under ESA within the project area could signal unusual circumstances that require the Agencies and the applicant to conduct appropriate studies to determine if the CE classification is proper. In the Federal endangered species, threatened species or critical habitat context, early coordination with the appropriate agency (U.S. Fish and Wildlife Service or National Marine Fisheries Service) and the results of the consultation process under section 7 of ESA would be critical in the final assessment of whether the CE classification is proper.

The amount of documentation needed for a project depends on the context in which the project takes place. Some actions may carry little risk of triggering unusual

circumstances such that there is no practical need for or benefit from obtaining and preparing documentation other than the project's description. Other actions may have the potential to raise unusual circumstances or may raise questions about a potential CE determination due to their more environmentally invasive nature and would, therefore, warrant sufficient documentation (like information on studies, analyses, or surveys conducted) to prove that the CE classification is appropriate. The Agencies' regulations establish a presumption that the types of actions that qualify for a (c)-list CE typically do not require much more than the project description to make a determination that the CE covers the proposed project and that there are no unusual circumstances that require additional environmental studies to determine if the CE determination is proper. The presumption for actions that qualify for (d)-list CEs is that they require additional information to make an appropriate CE determination because they are types of actions that are more environmentally invasive and have a higher potential to trigger one or more unusual circumstances.

In section 1318(c) of MAP-21, Congress required the Agencies treat actions that the Agencies have determined have a higher potential of triggering unusual circumstances as actions that do not have that higher potential to the extent that such movement complies with the criteria for a CE under 40 CFR 1508.4. The final rule reflects the Agencies' reconciliation of this requirement with their experience and the CEQ regulations. Specifically for FHWA, this reconciliation resulted in the creation of constraints that allow a subgroup of those actions to be treated as having a reduced risk of triggering unusual circumstances or challenges to the determination. Documentation and

any review considerations would need to demonstrate that the constraints for the use of the CE (i.e., those in paragraph (e)) have been met. Documentation may consist of checklists or other simplified reviews that address how the project meets constraints listed in § 771.117(e).

The Agencies received an anonymous comment that suggested CEs should be made available to the public and CEQ if they contain mitigation measures or if there are unresolved issues. The anonymous commenter, cited a court case (California v. Norton, 311 F.3d 1162, 1176 (9th Cir. 2002)) that stated that it was “difficult to determine if the application of an exclusion is arbitrary and capricious where there is no contemporaneous documentation to show that the agency considered the environmental consequences of its action and decided to apply a CE to the facts of a particular decision.” The anonymous commenter also noted that the Agencies’ regulations do not provide recommended courses of action, whether advanced as a categorical exclusion or a categorical exclusion created through imposition of a mitigation measure, for any proposal that involves unresolved conflicts concerning alternative uses of available resources (42 U.S.C. 4332(2)(E)).

The Agencies typically do not post CEs publicly as they issue a very large number each year and the process is designed to be expeditious and simple. In accordance with the CEQ NEPA implementing regulations, a categorical exclusion is a “category of actions which do not individually or cumulatively have a significant effect on the human environment *and which have been found to have no such effect* in procedures adopted by a Federal agency . . . .” (emphasis added) (40 CFR 1508.4). The Agencies generally have

to demonstrate that any proposed CE changes are supported by past Agency experience and do not result in significant environmental impacts; this is done by examining past environmental documents and practices. Actions that can be categorically excluded tend to be straightforward and supported by past Agency actions, so posting them publicly is not deemed appropriate. On occasion, CEs may be posted publicly, such as when there is high public interest in the action or there are substantial mitigation measures included pursuant to other environmental laws. In these cases, the FHWA Division Office or FTA Regional Office determines whether to post the CE, in coordination with the project sponsor/applicant. In addition, the Agencies may engage in public involvement for certain CEs if it is determined that it would be appropriate or needed for compliance with requirements other than NEPA. In response to the comment that the Agencies' regulations do not provide a recommended course of action when there are unresolved issues concerning alternative uses of available resources, the Agencies believe that the process for considering unusual circumstances would take these into account and provide opportunities to address them as needed. As noted above, and in §§ 771.117(b) and 771.118(b), potential issues are addressed through the consideration of unusual circumstances, and in the cases of FHWA CEs a detailed project-by-project review, which involve conducting studies to determine whether a CE is appropriate.

The FTA received a comment that requested clarification on the documentation requirements for § 771.118(c) CEs and § 771.118(d) CEs. The commenter further suggested that the following language from the preamble of the NRPM be included in the regulatory text of the final rule: "The project description [for a (c)-list CE] typically



contains all of the information necessary to determine if the action fits the description of the CE and that no unusual circumstances exist that would require further environmental studies.”

The FTA does not believe clarifying documentation requirements for the (c)-list CEs (§ 771.118(c)) versus the (d)-list examples (§ 771.118(d)) in the regulatory text is necessary because it is more appropriate to provide clarity in FTA’s “Guidance for Implementation of FTA’s Categorical Exclusions” (23 CFR 771.118). In general, grant applicants should include sufficient information for FTA to make a CE determination. Generally, a description of the project in the grant application, as well as any maps or figures typically included with the application or as requested by the FTA Regional Office is sufficient for FTA. Submission of this information through the FTA grant application process or through other means does not mean an action that otherwise meets the conditions for a CE under § 771.118(c) needs to be converted to a § 771.118(d) action. Given the nature of the CEs listed under § 771.118(c), documentation demonstrating compliance with environmental requirements other than NEPA, such as section 106 of the NHPA, or section 7 of ESA, may be necessary for the processing of the grant. That supporting documentation can be included in FTA’s grant management system or kept in the FTA Regional Office’s project files, and applicants should consult with their FTA Regional Office to determine which is preferred. Other applicable environmental requirements must be met regardless of the applicability of the CE under NEPA, but compliance with and documentation of other environmental requirements do not necessarily elevate an action that otherwise is categorically excluded under §

771.118(c) to § 771.118(d).

Section 771.118(d), which is an open-ended categorical exclusion authority, lists example actions and requires documentation to verify the application of a CE is appropriate (i.e., the action meets the criteria established in § 771.118(a) and (b)).

#### Outreach for New Rule

Two professional associations recommended FHWA develop centralized training for CE determinations and processing or promote the new CEs that are now available. One of the professional associations suggested FHWA develop a centralized data base for guidance and frequently asked questions (FAQ) to increase consistency in the application of these new rules. The commenter urged that the new CEs be implemented in a uniform manner, without differences among offices. The commenter also opposed the issuance of regional guidance. One federally recognized Tribe commented that the new rulemaking has the potential to significantly worsen consistency issues. The FTA received three comments that provided suggestions how to best engage in outreach and communicate with the public on the new rule. The comments specifically suggested training for Federal staff and State DOTs and a centralized resource that includes guidance and FAQs.

The Agencies provide consistency through national training and guidance. The Agencies support the National Highway Institute and the National Transit Institute, which conduct NEPA courses across the nation for employees of the Agencies, State DOTs, transit agencies, consultants, and other Federal, State, and local entities involved in transportation NEPA processes. The Agencies and their training institute partners update

the NEPA-related courses to address new regulations, policy, and guidance, including those related to CEs, as needed. The Agencies also have guidance on their NEPA processes, including CEs and ensure that training is consistent with the latest procedures and guidance. The Agencies will provide information on the availability of the new CEs to their environmental and field staff. To keep the public informed, FTA will update its “Guidance for Implementation of FTA’s Categorical Exclusions” (23 CFR 771.118) to reflect the new CEs and post it on FTA’s public Web site ([www.fta.dot.gov/12347\\_15129.html](http://www.fta.dot.gov/12347_15129.html)). The FTA also plans to hold a public Webinar to provide additional guidance on the CE changes. The FHWA will provide information about these CEs through its Division Offices, Resource Centers, and the Office of Project Development and Environmental Review, as necessary.

#### Agency Procedures

The Agencies received an anonymous comment suggesting that because the FHWA and FTA have their own missions, programs, and unique experiences, each agency should have its own separate NEPA procedures, not limited to just the CEs.

The Agencies are more similar than they are dissimilar with respect to the environmental review process and are therefore not pursuing separate procedures at this time. The Agencies have, however, separated their procedures where appropriate due to their individual programs. For example, each Agency has separate public involvement procedures identified in § 771.111 based on each Agency’s experience.

#### Section 771.117(c)

Six State DOTs and one professional association asked FHWA to add or adopt the

FTA CEs for bridge removal and for preventative maintenance because those CEs would be beneficial to provide coverage for bridge removal projects in situations where the bridge replacement CE does not apply. Four of the State DOTs and the professional association suggested that bridge removal activities do not depend on whether they are being carried out as part of a highway project or a transit project. Four State DOTs and one professional association said that it would be beneficial to provide a CE specifically for preventative maintenance activities in culverts and channels because it would eliminate uncertainty about whether these types of activities are covered by other CEs. One State DOT expressed concern with a FHWA bridge removal CE due to the amount of impacts that could occur in a typically sensitive habitat area. This same commenter asked whether a road realignment would be covered under the bridge removal CE if the removal requires a road realignment to the new bridge or whether the bridge construction CE would cover this action. One State DOT indicated that it has a PCE agreement that identifies bridge removal as a CE action.

The FHWA carefully considered whether to propose new CEs for bridge removal and for preventative maintenance activities and decided against it at this time. The FHWA was not able to identify projects that were limited to the act of removing the bridge with no additional action being taken (e.g., construction of a new water crossing). One possible scenario could be the removal of a bridge for safety purposes, but this action would qualify for the new CE in paragraph (c)(27) (highway safety or traffic operation improvements) if the constraints can be met, or the CE under paragraph (d)(13) if the constraints cannot be met.

The FHWA does not believe that a preventative maintenance CE is needed at this time. In FHWA's experience preventative maintenance actions typically take place within the operational right-of-way and would qualify for the recently created CE under existing paragraph (c)(22) (79 FR 2107).

Two State DOTs, one transit agency, and one professional association urged FHWA to move expeditiously to adopt a CE that specifically covers early right-of-way acquisitions under 23 U.S.C. 108(d), in order to clarify that these types of activities, like hardship and protective acquisitions (23 CFR 771.117(d)(12)), are covered by a CE. The professional association commented that the mere acquisition of property does not impact the environment.

The FHWA elected not to propose the requested CE because the Agency has not completed procedures to implement the amendments to 23 U.S.C. 108 introduced by section 1302 of MAP-21. Early acquisition projects for hardship and protective purposes that meet the statutory conditions in 23 U.S.C. 108(d) may be processed as CEs under § 771.117(d)(12), so long as no unusual circumstances exist that would lead FHWA to require the preparation of an EA or EIS. Early acquisition projects, depending on total estimated cost, also may meet the conditions specified by the CE for actions receiving limited Federal assistance in § 771.117(c)(23).

Sections 771.117(c)(24) and 771.118(c)(16)

Three State DOTs, one transit agency, one professional association, and one public interest group supported the addition of the new CE in § 771.117(c)(24) for geotechnical studies and investigations for preliminary design. Three State DOTs and

one professional association commented that this new CE could cause confusion by implying that these activities would trigger NEPA when there is no Federal action involved. Four State DOTs questioned the need for the CE because it implies that two NEPA approvals are needed (one for the preliminary investigation and one for the project itself) increasing documentation requirements and requiring reviewers to engage in environmental review for activities typically associated with the review itself. Some of the comments also applied to the FTA CE proposed for § 771.118(c)(16).

The Agencies' intent is to create new CEs for geotechnical and other investigations for preliminary design that involve ground disturbance. This can occur, for example, when these investigations or studies are undertaken to determine the suitability of a location for a project but the project itself is not ripe for analysis. The CEs apply when there is a Federal action involved, such as when FHWA undertakes the investigations (Federal Lands Highway programs) or when Federal-aid is used for these preliminary study actions. It is not intended to federalize actions taken by the applicants in furtherance of their applications without the use of Federal funds (see 40 CFR 1506.1(d) stating that the procedural requirements in NEPA are not intended to preclude the development by applicants of plans, designs, or performance of other work necessary to support an application for Federal, State, or local permits or assistance).

Two State DOTs asked for clarification on the breadth of the new CEs in §§ 771.117(c)(24) and 771.118(c)(16). One of the State DOTs requested the inclusion of paleontological studies as one of the activities covered by the CEs. Another State DOT asked the Agencies to limit the use of the CEs to stand-alone surveys that involve ground

disturbing activities only or specify that the CEs are not needed if the area has no previously identified archeological resources. The State DOT also requested the Agencies to establish a scale to the CEs so that they apply for more than a few hand-dug shovel probes.

The CEs cover geotechnical and other investigations for preliminary design that involve ground disturbance. The actions listed in the NPRM for these CEs were examples and are not an inclusive list. Paleontological studies would be covered by the CEs. The Agencies decided not to establish a scale for the CEs' applicability to provide for maximum flexibility for their use.

Three State DOTs and one professional association requested the Agencies to allow the use of the CE in § 771.117(c)(24) for all activities associated with preliminary investigations of a project instead of requiring the application of the CE for each individual investigation required for the project.

The Agencies believe that the CE in § 771.117(c)(24), as well as the CE in § 771.118(c)(16), should be used for all activities associated with preliminary investigation that involve ground disturbance when there is a Federal action involved such as when FHWA undertakes the investigations (Federal Lands Highway programs) or when Federal-aid is used for these preliminary study actions.

#### Section 771.117(c)(25)

Three State DOTs, two public interest groups, and one transit agency expressed support for the new CE in § 771.117(c)(25) for environmental restoration and pollution abatement actions. One State DOT indicated that it interprets this CE as covering

projects that exclusively install, repair, or replace culverts designed to allow fish passage. One State DOT requested the addition of “overall watershed management” to the language of the CE. One Federal agency asked that the constraint found in § 771.117(e)(3) be applied to this proposed CE. One State DOT commented that it would gain little value from the CE because it normally designs projects to minimize and/or mitigate impacts to waterways and ecosystems.

The new CE in § 771.117(c)(25) is intended to cover actions that involve returning a habitat, ecosystem, or landscape to a productive condition that supports natural ecological functions. Restoration actions serve to re-establish the basic structure and function associated with natural, productive conditions. This may include culverts designed for fish passage. The CE in § 771.117(c)(25) also covers both pollution abatement practices and control measures designed to retrofit existing facilities or minimize stormwater quality impacts from highway projects and watershed management actions that fit these groups and are eligible for Federal-aid highways. The actions listed in the NPRM for this CE were examples and are not an inclusive list. The FHWA does not believe that the CE needs a restriction similar to § 771.117(e)(3) because in the FHWA’s experience the typical highway actions associated with this CE do not result in adverse effects to historic properties, a use of a section 4(f) property other than a de minimis impact, or a finding that the action is likely to adversely affect a threatened or endangered species or critical habitat. The FHWA notes that this CE requires an evaluation of unusual circumstances, just as for any CE, and this evaluation would capture situations where an activity that otherwise qualifies for § 771.117(c)(25) could



result in adverse effects to historic properties or threatened and endangered species or critical habitat, or the use of section 4(f) properties that are not *de minimis*.

Section 771.117(c)(26)

Three State DOTs and one professional association suggested that the CE in § 771.117(c)(26) be divided into two parts: one for highway resurfacing, restoration, rehabilitation, and reconstruction (4R) projects without the constraints applied, and the other for all other projects with constraints applied. The commenters indicated that 4R projects often have no environmental impacts or have de minimis impacts because the projects do not expand the footprint of the travel surface. Two public interest groups opposed the shift of this CE from the (d)-list to the (c)-list even with the constraints proposed because: (1) this CE requires a case-by-case analysis to take into account the surrounding environment and particular context; (2) the constraints miss other environmental resources; and (3) adding more constraints would confuse the purpose of the (c)-list. Another public interest group urged the DOT to conclude that the wholesale transfer is simply not consistent with CEQ regulations at 40 CFR 1508.4. One State DOT suggested that § 771.117(c)(26) actions should accommodate adding capacity to a highway as long as the project disturbance “widens less than a single lane width.” Another State DOT asked that the term “passing lanes” be included in § 771.117(c)(26) to clarify that the construction of intermittent passing lanes is an activity that FHWA has historically approved as a § 771.117(d)(1) CE. One State DOT pointed out that the activities most likely to have the potential for significant impacts are the addition of shoulders and auxiliary lanes. A public interest group sought clarification on whether the

term reconstruction included adding additional capacity or whether it simply meant reconstruction of an existing facility. The commenter recommended that only reconstruction that did not add capacity be moved to the (c)-list CE list.

The FHWA agrees with the commenters that a wholesale transfer without qualifications would be inconsistent with 40 CFR 1508.4. However, FHWA found that, based on its experience, a transfer with qualifications (i.e., the constraints in paragraph (e)) would be consistent with 40 CFR 1508.4. (See NPRM preamble, 47 FR 57587, 57590-91). The FHWA's proposed approach to moving the first three actions on the (d)-list to the (c)-list preserves the original (d)-listed CE actions through § 771.117(d)(13) and acknowledges that the actions in § 771.117(c)(26), (27), and (28) are identical except that those actions processed under § 771.117(d)(13) do not meet the constraints in § 771.117(e). The FHWA believes this approach meets the statutory requirements for the move and will result in greater consistency in application and fewer errors than further dividing the actions. Highway modernization actions, § 771.117(c)(26), would not include actions that add capacity because in FHWA's experience such actions require a review of the context in which the project takes place, which means a detailed project-by-project review. The addition of auxiliary lanes such as climbing, turning, passing lanes, and other purposes supplementary to through-traffic movement (see definition in <http://www.ops.fhwa.dot.gov/freewaymgmt/hovguidance/glossary.htm>) rather than adding capacity, serves primarily to increase safety, which could qualify for CE in § 771.117(c)(27) for safety projects. The FHWA notes that some actions formerly processed under § 771.117(d)(1), (2), and (3) may also qualify for the recently created

CE in § 771.117(c)(22) (if they are limited to the existing operational right-of-way), or § 771.117(c)(23) (if the total costs and Federal investments in the project meet the criteria for that CE).

Section 771.117(c)(27)

Two public interest groups opposed the shift of the new CE in § 771.117(c)(27) for highway safety projects from the (d)-list to the (c)-list even with the constraints proposed because (1) the CE requires a case-by-case analysis to take into account the surrounding environment and particular context, (2) the constraints miss other environmental resources, and (3) adding more constraints would confuse the purpose of the (c)-list. Another public interest group urged the Department of Transportation to conclude that the wholesale transfer is simply not consistent with CEQ regulations at 40 CFR 1508.4.

The FHWA's proposed approach to moving the first three actions on the (d)-list to the (c)-list preserves the original (d)-listed actions in § 771.117(d)(13) and acknowledges that the actions in section 771.117(c)(26), (27), and (28) are identical except that those actions processed under § 771.117(d)(13) do not meet the constraints in the new § 771.117(e). The FHWA believes this approach meets the statutory requirements for the move and will result in greater consistency in application and fewer errors than further dividing the actions. The constraints in § 771.117(e) are intended to take into account considerations with regards to the surrounding environment and particular context that would necessitate additional documentation and oversight or approval by FHWA. The FHWA did not intend to cover all potential scenarios and

issues that could raise these concerns, rather the decision to limit the constraints to those resource areas addressed was based on FHWA past experience in implementing these types of projects and the areas of concern that most frequently come up with these types of projects.

Section 771.117(c)(28)

Two public interest groups opposed the shift of the new CE in § 771.117(c)(28) for bridge rehabilitation, reconstruction, and replacement activities from the (d)-list to the (c)-list even with the constraints proposed because: (1) the CE requires a case-by-case analysis to take into account the surrounding environment and particular context; (2) the constraints miss other environmental resources; and (3) adding more constraints would confuse the purpose of the (c)-list. One public interest group indicated that, in the absence of adequate constraints or conditions, these projects could include destruction and replacement of historic bridges, or the construction of massive new elevated bridge structures for grade-separated railroad crossings within historic districts. The commenter indicated that strong safeguards are needed to ensure that these CEs are not applied when the projects involve potentially significant impacts. The commenter also suggested that a more refined approach of separating out the activities that are truly unlikely to cause any sort of significant impact, such as a bridge rehabilitation and repair projects, and shifting those to the (c)-list and keeping in the (d)-list the more destructive projects like those that would require destroying an existing bridge structure or constructing a new one where none currently exists. One State DOT requested the addition of a qualification to cover “design modification to meet current design standards.”

The FHWA believes this approach meets the statutory requirements for the move and will result in greater consistency in application and fewer errors than further dividing the actions. The constraints in § 771.117(e) are intended to take into account those considerations with regards to the surrounding environment and particular context that experience has shown necessitate additional documentation and oversight or approval by FHWA. The FHWA did not intend to cover all potential scenarios and issues that could raise these concerns, rather the decision to limit the constraints to those resource areas addressed was based on FHWA past experience in implementing these types of projects and the areas of concern that most frequently come up with these types of projects. In addition to these constraints, the CE for bridge-related actions is subject to an evaluation of unusual circumstances that would take into account the potential for the action to result in significant environmental impacts. The FHWA considered the refined approach of segregating the activities covered in the CEs as suggested by the public interest group and decided against it because in the Agency's experience all activities mentioned can be classified as a CE as long as the constraints in § 771.117(e) are met. Removing and disposing of a bridge or the construction of a new bridge at a new location (to replace an old bridge) would not typically result in significant impacts and there would not be a need for additional documentation and project-by-project approval by FHWA for the CE determination if the constraints are met. Finally, the FHWA notes that a rehabilitation, reconstruction, or replacement of a bridge would take into account current codes and design standards. However, the FHWA recognizes there may be situations where the modification of the bridge to accommodate current codes and design standards could

result the failure to meet a constraint under § 771.117(e). In these situations other CEs may be available for the project, such as the new CE in § 771.117(d)(13).

Section 771.117(c)(29)

Two State DOTs, one public interest group, and one transit agency supported the addition of the new CE in § 771.117(c)(29) (ferry vessels).

The Agencies will adopt this CE as proposed.

Section 771.117(c)(30)

Two State DOTs, one public interest group, and one transit agency supported the addition of the new CE in § 771.117(c)(30) for rehabilitation or reconstruction of ferry facilities. One State DOT asked that the phrase “substantial increase in users” be replaced with “substantial increase in that facility’s capacity” as a constraint for the ferry facilities rehabilitation and reconstruction. The State DOT indicated that the constraint that facilities “do not result in a substantial increase in users” would be difficult to predict because of year-to-year fluctuation in ferry users. In the State DOT’s experience it is nearly impossible to predict whether a particular ferry terminal project will result in an increase in users. The State DOT indicated that the term “users” is imprecise and can be interpreted in many ways. The commenter suggests using a more precise phrase, such as “substantial increase in that facility’s capacity.”

The FHWA agrees with the commenter stating that an increase of users is not as accurate as capacity to apply in the rehabilitation or reconstruction of existing ferry facilities CE. The intent of this constraint in applying this CE is to ensure that project impacts undergo an appropriate level of review and capacity reflects this distinction

better than users. The FHWA considered this comment and modified the constraint to state: “does not result in a substantial increase in the existing facility’s capacity.”

#### Section 771.117(d)

Three State DOTs and one professional association supported the retention of the three (d)-listed CEs in the proposed rule as possible documented CE actions to retain flexibility.

The FHWA will retain all of the actions formerly listed in § 771.117(d)(1), (2), and (3) via paragraph (d)(13). This will provide notice that such actions may be processed as (d)-list CEs if any of the constraints in § 771.117(e) cannot be met for those actions, and it is determined with additional documentation that a CE classification is proper. It is also possible for those actions to be processed under § 771.117(c)(22) (if the actions are confined to the existing operational right-of-way) or § 771.117(c)(23) (if the action meets the funding conditions specified in that CE).

#### Section 771.117(e)

##### Constraints Applicability

Five State DOTs and one professional association commented that the constraints for the three moved (d)-list CEs were unnecessary and would preclude the use of CEs for projects with minor impacts. Two State DOTs and one professional association expressed concern with the constraints because they reflect a one-size-fits-all approach: all States would be subject to the same list of constraints, regardless of the unique circumstances in each State. These same commenters proposed that FHWA could alternatively issue guidance for determining whether additional documentation needs to

be prepared to assess the potential for “unusual circumstances.” This approach would build on the existing requirement in 23 CFR 771.117(b), which requires “appropriate environmental studies to determine if the CE classification is proper” for any action that “could involve unusual circumstances.” Two State DOT commenters stated that moving the first three actions from the (d)-list to the (c)-list need not include the six constraints because of consideration of extraordinary circumstances was sufficient. One public interest group agreed with the Agencies that an “unconditional” move to the (c)-list was not warranted and that it supported, at the very least, the six “constraints” that were proposed for the move. One Federal agency supported the Agencies’ efforts to condition the move of the three (d)-list CEs to the (c)-list and indicated that in their experience these types of projects could have greater than minimal impacts on aquatic resources.

The FHWA believes the final regulation strikes a reasonable balance between taking into account the environmental context in which a project takes place with reducing documentation and promoting administrative expediency. The list of constraints was derived from a list originally established in a 1989 FHWA memorandum (FHWA Memorandum – Categorical Exclusion (CE) Documentation and Approval, Mar. 30, 1989, <http://environment.fhwa.dot.gov/projdev/docuceda.asp>) (hereinafter FHWA’s 1989 PCE Memorandum) on how to develop PCE agreements and refined based on the Agency’s experience with these programmatic approaches. The FHWA’s experience with State DOTs that use PCE agreements indicates that these constraints are appropriate for determining when a CE determination may be processed without project-by-project review by FHWA. The constraints for § 771.117(c)(26), (27), and (28) help to focus



attention on projects with particular environmental concerns while speeding the approval of projects with minor or trivial environmental impacts.

The constraints in § 771.117(e) are different than the unusual circumstances specified in § 771.117(b). Per § 771.117(b), “any action which normally would be classified as a CE but could involve unusual circumstances will require the FHWA, in cooperation with the applicant, to conduct appropriate environmental studies to determine if the CE classification is proper.” This means that when unusual circumstances may be present, documentation is expected to demonstrate there are no unusual circumstances that warrant a higher level of NEPA review even when the project does not require detailed documentation and Agency review. However, the potential for unusual circumstances for a project does not automatically trigger an EA or EIS. The constraints are not another articulation of the unusual circumstances; rather they are conditions that, if followed, would eliminate the need for detailed project-by-project review from FHWA. Failure to meet one or more of the constraints would mean that the project could not be processed with a (c)-list CE. The action may be approved as a (d)-list CE after detailed review of the project and appropriate documentation. However, failure to meet one or more of the constraints does not mean that the project has unusual circumstances that warrant the start of an EA or EIS process. The FHWA defined all the constraints in § 771.117(e) in such a way that it is possible to assess whether the constraints can be met by considering the available information about a project’s context and location. Preferably, available information could be assessed through a review of existing maps and databases without having to conduct field reviews or studies. For many CE actions,

it should be similarly possible to consider unusual circumstances by reviewing maps and databases, but some projects may require field review or environmental analysis.

Two public interest groups indicated that the decision to place conditions on the transfer of the CEs was appropriate but insufficient to properly protect environmental resources and to fully account for the nature of the (c)-list. The commenters indicated that the six constraints provided safeguards for impacts to species, wetlands, floodplains, historic places, and resources protected by section 4(f), but not others such as impacts to streams, air quality, non-endangered or threatened species, and light and noise pollution. The commenters and one other public interest group urged the DOT to conclude that the wholesale transfer to the (c)-list CEs from the (d)-list was simply not consistent with the CEQ regulations (40 CFR 1508.4), and therefore should be rejected. One of the public interest groups commented that the transfer of these three categories of actions to the (c)-list with the proposed six constraints would undoubtedly lead to violations of 40 CFR 1508.4, as projects with significant impacts would be processed as a CE without any analysis. The commenter also stated that to safeguard against this concern, additional constraints would need to be placed in § 771.117(e) to ensure that environmental resources will be sufficiently protected, but this would confuse the purpose of the (c)-list, which has in the past been purely a list of activities that do not require case-by-case review. One State DOT suggested that these constraints “encourage minimizing certain environmental impacts” rather than avoiding detailed project-by-project FHWA review.

The FHWA believes the constraints listed in § 771.117(e) are appropriate for ensuring consideration of certain impacts occurs given a project’s context and location.

The FHWA's experience with the three (d)-list CE actions is very broad and includes projects that involve potentially significant effects. The FHWA's experience with State DOTs that use PCE agreements indicates that these constraints are appropriate for determining when a CE determination may be processed without detailed project-by-project review by FHWA. The FHWA disagrees that the six constraints are insufficient to appropriately consider project impacts for purposes of (c)-list classification. The constraints in § 771.117(e) are intended to take into account considerations with regards to the surrounding environment and particular context that would otherwise necessitate additional documentation and detailed project-by-project review by FHWA. The FHWA did not intend to cover all potential scenarios and issues that could raise these concerns; the decision to limit the constraints to the listed resource areas was based on FHWA past experience in implementing these types of projects and the areas of concern frequently associated with these types of projects. Although no FHWA regulatory requirements apply for controlling light pollution, such impacts would be considered, if applicable, in the evaluation of unusual circumstances. For example, artificial illumination of the night sky by a project in a context where darkness is necessary (such as where there is an observatory) would trigger a consideration of light pollution as an unusual circumstance.

#### Constraints' Purpose

Two State DOTs requested more explanation on the purpose of the constraints for actions listed in § 771.117(c)(26), (27), and (28). They asked whether the constraints were motivated to ensure that regulatory obligations were met (for example, section 404 of the CWA or section 106 of the NHPA compliance) rather than ensuring that project

classification (significance of impacts) is correct and whether a project that does not meet the constraints could be processed as a CE, although it would be subject to a higher level of review. They noted that as long as all appropriate permits are obtained, and impacts are not found to be significant, then there is no need for this constraint.

The FHWA list of constraints to actions listed in § 771.117(c)(26), (27), and (28) is meant to distinguish actions that normally would require a higher level of documentation and detailed project-by-project review by FHWA through a (d)-list CE compared to actions that should be processed as (c)-listed CEs. Some of the constraints exclude projects from a (c)-list CE for FHWA when they trigger a permit because the information needed for the permit requires additional environmental studies, documentation, and review. Such studies, review, and documentation are expected for FHWA (d)-list CEs to assist in the detailed project-by-project review. The constraints in § 771.117(e) were based on FHWA past experience in implementing these types of projects and the areas of concern frequently associated with these types of projects. Projects that satisfy all constraints may be processed as (c)-list CEs. If one or more of the constraints cannot be met, the action could still be processed as a (d)-list CE under § 771.117(d)(13).

#### Section 771.117(e)

Two State DOTs and one professional association remarked that some of the constraints involve subjective determinations (e.g., “more than a minor amount of right-of-way” and “major traffic disruptions or substantial environmental impacts”). One State DOT and one professional association remarked on the level of specificity of the

constraints. Another State DOT suggested that FHWA should establish standard definitions, such as for a minor amount of right-of-way, for use by Division Offices and States for greater consistency of application. In contrast, one professional association recommended clarifying in the final rule that Division Offices and States may adopt specific thresholds for determining whether an action meets these criteria. Adopting specific thresholds, on a State-by-State basis, the commenter indicates, will help to simplify the process for determining that the criteria are met.

The list of constraints was derived from a list originally established in the FHWA's 1989 PCE Memorandum. This list has been refined by experience over time and in most State DOTs' PCE agreements with FHWA. The FHWA recognizes for three of the constraints that each State's unique environmental context should be considered in determining whether an action meets these criteria. For constraints in § 771.117(e)(1), (4), and (5), State DOTs and Division Offices may adopt specific thresholds for determining what is more than a minor amount of right-of-way (§ 771.117(e)(1)), what defines major traffic disruption or substantial environmental impacts from an existing road, bridge, or ramp closure or the construction of a temporary access (§ 771.117(e)(4)), and how to distinguish changes in access control that deserve further evaluation from ones that do not (§ 771.117(e)(5)), as appropriate.

#### Section 771.117(e)(1) Right-of-way

The FHWA has substituted the term "non-residential" for "commercial" in this constraint to be consistent with terminology in the Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-assisted Programs regulations (49

CFR part 24). Any displacement of persons within the meaning of the Uniform Act must be taken into account in determining whether the action meets the constraint. The text now reads “[a]n acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacement.”

#### Section 771.117(e)(2) Permits

One State DOT recommended that flexibility be provided with the constraint in § 771.117(e)(2) for a situation where a State DOT and FHWA Division Office enter into an agreement with the U.S. Coast Guard (USCG) and/or USACE that programmatically merges their respective permitting processes with actions on the (c)-list. Another State DOT suggested that the constraint in subparagraph (e)(2) is tied to regulatory compliance with other laws and would be satisfied independent of the CE classification and indicates it is unnecessary. Another State DOT said that forcing a State DOT to come up with documentation and a review process for each project that requires a CWA section 404 permit is burdensome and time consuming.

Sufficient information about a project’s proposed scope, location, and context should be available during planning and initial project scoping to indicate whether an individual section 404 permit by the USACE or a USCG permit would be needed. It is not necessary to fully develop information or documentation for such permits to determine whether this condition is met. An FHWA detailed project-by-project review is needed if, based on preliminary project information, a CWA section 404 individual permit is likely going to be required. If agencies can collaborate to develop programmatic approaches that more efficiently satisfy the requirements instead of

completing individual permits, such approaches should also satisfy this constraint.

The USACE stated that correlating the use of the three (c)-list CEs with activities that would generally comply with the terms and conditions of a nationwide or regional general permit (i.e., paragraph (e)(2)) would indirectly encourage transportation agencies to minimize impacts to aquatic resources while protecting the integrity of the CE). The USACE was supportive of the message that USACE would make the ultimate determination whether an action complies with the terms and conditions of a nationwide or regional general permit, as well as the appropriate NEPA class of action to qualify for NWP 23. The USACE suggested that the final rule recommend transportation agencies contact them when conducting re-evaluations or providing supplemental documentation in support of review under a (d)-list CE to properly address those issues which triggered an Individual Permit review process.

The FHWA concurs with the USACE that correlating the use of the CEs with activities that comply with the terms and conditions of a nationwide or regional general permit would encourage transportation agencies to minimize impacts to aquatic resources. The USACE is in the best position to make the final determination that an activity qualifies for a nationwide or regional general permit. Section 771.129(c) (re-evaluations) would apply when an action affecting waters of the U.S. is initially determined to qualify for a CE under § 771.117(c)(26), (c)(27), or (c)(28) but later is determined not to qualify for verification under a nationwide or regional general permit. Although the action may no longer qualify for the (c)-list CEs, it may qualify for a (d)-list CE (such as a CE under § 771.117(d)(13)). In engaging in the re-evaluation process

under § 771.129(c), transportation agencies should communicate with the USACE to properly address those issues which triggered a section 404 Individual Permit review process.

Section 771.117(e)(3) ESA, Section 106, Section 4(f)

One State DOT suggested providing additional flexibility to satisfy the constraint in § 771.117(e)(3) by allowing for “programmatic” agreements to address section 4(f), Land and Water Conservation Fund section 6(f), NHPA section 106, and the ESA. Another State DOT suggested that this constraint is tied to regulatory compliance of other laws and would be satisfied independently of the CE classification, making it unnecessary. A Federal agency asked that this constraint include compliance with the Bald and Golden Eagle Protection Act (BGEPA) and the Migratory Bird Treaty Act (MBTA).

Section 4(f) programmatic evaluations include an alternatives analysis to avoid the use of a section 4(f) resource, which necessitates additional documentation and an FHWA finding, and often requires a detailed FHWA review. The FHWA has limited experience with programmatic agreements under section 6(f) of the Land and Water Conservation Fund Act and as a result, the FHWA decided not to develop a constraint around that threshold at this time. Programmatic approaches for section 106 of NHPA and section 7 of ESA may be considered in the evaluation of the constraints as long as the programmatic approaches meet the specified constraint thresholds. An example is when a State DOT relies on an existing section 106 programmatic agreement that establishes conditions to prevent an undertaking from resulting in adverse effects to historic



properties. The State DOT may not rely on a section 106 programmatic agreement that establishes treatment measures for adverse effects. Another example would be reliance on a programmatic approach under section 7 of the ESA that would allow projects to be determined to “not likely to adversely affect” threatened or endangered species or critical habitat. The FHWA considered the request to include compliance with other wildlife laws, such as the BGEPA and MBTA, and decided that consideration of the ESA was adequate based on past experience with PCE agreements. A factor in making this determination was that the BGEPA and MBTA do not have similar review thresholds as ESA (i.e., “no effect,” “may affect/not likely to adversely affect,” or “may affect/likely to adversely affect”). All other requirements applicable to the activity under other Federal and State statutes and regulations still apply regardless of the § 771.117(e) constraints, and must be met before the action proceeds, regardless of the availability of a CE for the transportation project under part 771.

#### Section 771.117(e)(4) Traffic Disruption

One State DOT asked for clarification of the word “substantial” in the § 771.117(e)(4) constraint especially as it relates to the overall improvements that the project would allow and as those impacts are mitigated during construction (such as providing public information that would help mitigate traffic disruption during construction). One State DOT noted that the constraint meant that the action could not be processed as a CE if road closures or the construction of temporary access to existing roads would result in major traffic disruptions. The commenter indicated that this would severely limit the application of these CEs, especially in heavily urbanized areas where

traffic congestion is usually high and the transportation improvement project is more than likely needed to relieve existing congestion. The commenter disagreed that temporary access could result in major traffic disruptions. The commenter indicated that the construction of temporary access is typically used to provide temporary relief from traffic disruptions and are temporary in nature; therefore, it should not be equated with road closures or considered an exception to the use of a CE. Another commenter stated that this constraint was unnecessary as traffic disruption would be considered as part of unusual circumstances.

In FHWA's experience, temporary road, bridge, detour, or ramp closures deserve a higher level of scrutiny and detailed project-by-project review because they are the types of activities that have merited additional review given their potential to have substantial adverse impacts. The FHWA sees the value in allowing Division Offices and State DOTs to adopt specific criteria for the "substantial" threshold. The FHWA has revised the constraint to focus on the activity involved (i.e., the closure or construction) and further change is not warranted. This constraint would not automatically eliminate the use of the (d)-list CE.

#### Section 771.117(e)(5) Access Control

Two State DOTs and one professional association recommended revising the constraint in § 771.117(e)(5) to be limited to changes in access control "that raise major concerns regarding environmental effects." They also asked that the final rule clarify that the Division Office and State DOTs can adopt specific criteria for determining if this constraint is met. Two State DOTs asked that the constraint for changes in access control

mirror the language in § 771.117(e)(1) so it would read “more than minor changes in access control.” One State DOT and one professional association suggested that some access changes were sufficiently “minor” (e.g., closing just one access) to allow a project to be processed as a (c)-list CE. Some examples include the installation of medians or a C-curb break in access control for maintenance or emergency access, minimal alterations, or adjustments to driveways. One State DOT asked that the constraint be clarified to say the changes in access control would need to affect traffic patterns for more documentation to be required.

Changing the text of the constraint to “more than minor changes in access control” or “that raise major concerns regarding environmental effects” would put this language at odds with the (d)-list CE for approvals of changes in access control (§ 771.117(d)(7)), which FHWA is not modifying at this time. The FHWA recognizes that some changes may raise minor concerns and result in no significant environmental impacts or no safety and operational performance issues, while others may raise concerns regarding their environmental effects and deserve a careful consideration of their safety and operational performance through further evaluation, but these decisions depend on the environmental context and regulatory framework of each State. The FHWA sees the value in allowing FHWA Division Offices and States to adopt specific criteria for the “change in access control” threshold. In establishing this threshold, State DOTs and FHWA Division Offices would focus on their experience with changes and access control and the range of impacts that result from the various changes in access that may occur in the State. The State DOTs and FHWA Division Offices would establish, through a PCE

agreement or other formalized programmatic agreement, which of those require detailed project-by-project review.

#### Section 771.117(e)(6) Floodplains and Wild and Scenic Rivers

Two State DOTs asked that the constraint in § 771.117(e)(6) regarding floodplains and wild and scenic rivers be removed because it may limit enhancement actions, or that it be revised to allow for some actions within the floodway. Two other State DOTs recommended revising this constraint to refer to projects with floodplain encroachment “that adversely affect the function of the floodplain.” One State DOT and one professional association asked that the final rule clarify that the State DOTs and Division Offices may adopt specific criteria for determining if this constraint is met. One State DOT suggested the constraint be limited to a floodplain encroachment that requires a “Letter of Map Revision” which they believe is alluded to in the discussion, but not in the proposed regulatory language. Another State DOT asked that FHWA consider replacing the text with a restriction against projects that “result in an increase in the designated regulatory floodway, or may result in an increase of more than 1 foot of surface water elevation in the base floodplain when no regulatory floodway is designated, or may increase the risk of damage to property and loss of human life, or may result in modification of a watercourse.” One State DOT suggested that the constraint be limited to “a significant floodplain encroachment” because if a simple auxiliary lane project pushes the roadway shoulder 1 foot into the floodplain for even just a few feet, the project could not be processed as a (c)-list CE. One State DOT indicated that floodplain encroachments and involvement of a wild and scenic river entail separate processing

requirements, regardless of a CE class of action and therefore did not think this constraint was necessary.

The FHWA believes the § 771.117(e)(6) constraint is necessary to assess the level of documentation detail necessary for a CE classification when a project involves a floodplain encroachment or a wild and scenic river. After considering the suggestions from commenters on how to revise this constraint, the FHWA decided to retain the constraint language as proposed in the NPRM. A floodplain encroachment would trigger consideration of practicable alternatives under Executive Order 11988 and the FHWA implementing regulations at 23 CFR part 650, subpart A. It also indicates a higher risk of environmental impacts that deserve careful evaluation and consideration. This means that additional documentation, analysis, and detailed review is needed to meet the floodplain management requirements and, therefore, a (d)-list CE is more appropriate. The action could proceed as a (c)-list CE if it encroaches on floodplains but the action is for a functionally dependent use or an action that facilitates open space use. Functionally dependent uses are actions that must occur in close proximity to water (e.g., bridges).

#### Section 771.117(g)

Three State DOTs and one professional association stated the statute included no rulemaking requirements for PCE agreements. Four State DOTs indicated that imposing these requirements through rulemaking was inconsistent with the intent of the statute. The commenters recommended that FHWA release non-binding guidance, including a template agreement, rather than issue regulations on PCE agreements. Two State DOTs objected to the proposal to establish new requirements for all PCE agreements and the

requirement for all existing agreements to be amended for consistency with the new requirements. One State DOT said existing agreements should be “grandfathered” and thus exempt from any new requirements and expressed concern that existing PCE agreements may be overturned.

The FHWA considers this rulemaking to be appropriate in light of the statutory change that allows for State DOTs to enter into agreements with FHWA to make CE determinations on FHWA’s behalf. The FHWA has taken a careful look at the requirements that were proposed in the NPRM in light of the comments submitted to determine which were necessary in the regulatory text and which could be implemented administratively. The Agency decided that those requirements that were substantive (i.e., elements that the agreement must have) should be established through rulemaking and those that were either procedural (i.e., steps that must be met) or administrative (i.e., how FHWA processes the agreement internally) could be removed from the regulatory text and established through other means. As a result, the Agency decided to retain requirements in subparagraphs (g)(1) (State DOT’s responsibilities), (g)(2) (five year term), (g)(3) (monitoring requirements), and (g)(4) (stipulations for amendments, termination, and public availability), but remove from the regulatory text the legal sufficiency and FHWA Headquarters review in subparagraph (g)(5) of the NPRM. The FHWA believes that its Headquarters program office and legal office should engage in review of these agreements, but establishing this requirement in the regulatory text is unnecessary because it is an internal process that is better established through internal administrative protocols.

Although FHWA disagrees with commenters expressing preference for guidance instead of rulemaking on this subject, the Agency is receptive to the suggestion of developing guidance including a template agreement on this topic. The FHWA disagrees with the commenters' proposal to exempt renewal of existing or certain future agreements from this rule because this would result in inconsistent development of PCE agreements. Finally, in an effort to provide more clarity to the regulatory text the FHWA has deleted the phrase "[n]otwithstanding paragraph (d) of this section" as proposed in the NPRM because it was unnecessary since the introductory paragraph of 771.117(d) now contemplates the use of programmatic agreements as an alternate method for approvals.

Five State DOTs and one professional association expressed concern that the proposed rule did not allow PCE agreements to include CEs that were not specifically listed in the regulations. The commenters also noted that State DOTs should be allowed to approve CEs that are not listed in FHWA's regulations, as long as those CEs are "consistent with" the criteria in the CEQ regulations.

The FHWA evaluated these comments and determined that new CEs not specifically listed in the regulations would not be allowed in the PCE agreements unless they are established in accordance with CEQ regulations and guidance (40 CFR 1507.3 and 1508.4, and Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act (75 FR 75628, Dec. 6, 2010)). To make this clear, the FHWA has added additional language in the text of the rule specifying that this authority is limited to CEs specifically listed in 771.117(c) and the activities identified in

(d).

One State DOT compared and contrasted the CE processing flexibilities for States under a PCE agreement with 23 U.S.C. 326 where the State has assumed responsibility and liability for FHWA decisions. The commenter suggested that a 23 U.S.C. 326 Memorandum of Understanding (MOU) should provide the opportunity for States to make CE approvals for actions not listed in regulation.

The Agencies considered this comment and found it not to directly relate to the MAP-21 section 1318 provisions. The provisions of paragraph (g) in § 771.117 do not apply to the section 326 program.

#### PCE Workload

One State DOT was concerned that PCE agreement monitoring and reporting requirements will increase the States' workload and may result in State DOTs requiring additional staff to ensure PCE compliance. The proposed oversight and quality control/quality assurance requirements are similar to those mandated by a CE Assumption MOU under 23 U.S.C. 326 (State assumption of responsibility for categorical exclusions). Under that program, the State DOT had to hire additional staff to successfully assume CE responsibilities. The State DOT also said it is foreseeable that States will be required to hire additional staff and revise procedures in order to comply with the proposed PCE requirements where the intent of MAP-21 was not to add additional staffing and workload requirements to CE approvals.

The comment expressing concern about the burden to State DOTs tied to monitoring PCE agreements did not distinguish between monitoring of PCE agreements



or monitoring of MOUs executed pursuant to 23 U.S.C. 326 where a State is responsible and legally liable for the CE determinations it makes. The commenter's concern is based on its experience with the monitoring process under a section 326 MOU and not a PCE agreement. It may have been appropriate for the commenting State DOT to hire additional staff to assume CE responsibilities because they were not only making CE determinations, but also were assuming responsibilities for compliance with all associated environmental laws and regulations associated with that CE determination. The quality control and quality assurance requirement in § 771.117(g) for State DOTs may already be incorporated in existing CE processing procedures. This monitoring requirement should be comparable to the manner of monitoring existing PCE agreements.

Two public interest groups and one State DOT suggested that § 771.117(g)(3) be expanded to explain further what "monitoring" of PCE agreements should entail. The State DOT suggested that in the alternative the provision be removed. One public interest group requested a clarification of public disclosure requirements of PCE documents and suggested that citizens be allowed to monitor any PCE agreement.

The FHWA will retain the requirement for monitoring for all PCE agreements. The purpose of monitoring comes from FHWA's oversight obligation of the Federal-aid program to ensure that CE determinations are appropriate and that State DOTs comply with all environmental requirements. The approach for conducting monitoring should be determined between each State DOT and FHWA Division Office. Division Office staff should determine the frequency and level of detail for monitoring events as well as the composition of the monitoring team. This monitoring also should identify best practices

and lead to the implementation of corrective actions based on report findings and observations. The State DOT and the FHWA Division Office will determine the extent to which monitoring information will be made available through posting on the Web.

Section 771.118(a) and (b)

The FTA received two comments that expressed concern over the potential impacts of the actions included in the new CEs on sensitive habitats and protected resources.

Sections 771.118(a) and (b) include the requirement for considering unusual circumstances, which is how the Agencies consider extraordinary circumstances in accordance with the CEQ regulations. These refer to circumstances in which a normally excluded action could have a significant environmental impact and, therefore, requires appropriate environmental studies to determine if the CE classification is proper. Examples of unusual circumstances include substantial controversy on environmental grounds, significant impacts on properties protected by section 4(f) of the DOT Act or section 106 of the NHPA, or inconsistencies with any Federal, State, or local law, requirement, or administrative determination relating to the environmental aspects of the action (23 CFR 771.118(b)). The unusual circumstances provisions contained in § 771.118(a) and (b) apply to all existing and newly proposed CEs, and serve as a safeguard to prevent significant impacts to sensitive habitats and protection resources, among other concerns. An example of this practice would be if sizeable swaths of habitat are impacted for an action, then that unusual circumstance would likely require FTA and the grant applicant to conduct appropriate environmental studies under § 771.118(b)(1) to

determine whether the CE classification is proper.

Section 771.118(c)(14)

The FTA received two comments requesting clarification on how § 771.118(c)(14) differs from the existing CEs. Specifically, one comment requested clarification on the types of repair and replacement work applicable to this new CE versus those in § 771.118(c)(8) (maintenance, reconstruction, and rehabilitation of facilities). The second comment asks whether the necessary realignment of a road following a bridge removal would be covered under the new CE or another CE.

The new CE expands upon existing CEs to include permanent bridge removal and the resulting change to the associated transportation network. The CE further addresses the potential need to realign the transportation network connected to the bridge and any activities associated with the work not included in previously established CEs. These activities could include in-channel work, pier removal or reduction, and materials disposal. Section 771.118(c)(8) specifically focuses on the repair of existing facilities that do not change the facility's use, while this new CE includes permanent bridge removal that changes the end use.

The FTA received a comment requesting clarification on the circumstances where reducing pier height would serve to make in-water navigation safer when conducting a complete bridge removal.

In some instances, when removing a bridge, it is decided to leave piers in place, rather than remove them. The considerations in this decision are varied, but include cost considerations as well as environmental considerations (e.g., avoidance of exposure in

cases of contaminated sediments and other CWA considerations, as well as cost considerations). In cases where piers are left in place, they are reduced in height to be below water level, but above sediment levels, to allow for water craft to safely traverse over the piers. The decision to leave piers in place is also based on coordination with stakeholders, permitting agencies, and project engineers, and depends on the project context (e.g., location, conditions, etc.).

#### Section 771.118(c)(15)

The FTA received three comments recommending the text of the CE be amended to include “and drainage pipes” at the end of the last sentence. The commenters noted that expanding existing culverts and existing drainage pipes would likely result in similar impacts, and since culverts often are used as drainage pipes, the language should be clarified by including drainage pipes so to avoid confusion and an unintended distinction.

The FTA agrees with the comment, and will amend § 771.118(c)(15) to read “Preventative maintenance, including safety treatments, to culverts and channels within and adjacent to transportation right-of-way to prevent damage to the transportation facility and adjoining property, plus any necessary channel work, such as restoring, replacing, reconstructing, and rehabilitating culverts and drainage pipes; and, expanding existing culverts and drainage pipes.” At times, this preventative maintenance may require expanding existing culverts or drainage pipes in order to properly manage the stormwater flow. The FTA reassessed its supporting documentation and found the addition of expanding existing “drainage pipes” is supported by FTA’s record (see “FTA Section 1318 Substantiation” document). In practice, culverts and drainage pipes both

provide or maintain stormwater drainage, with culverts typically being larger in diameter than drainage pipes. Due to their functional similarity and anticipated similar impacts, as well as the limitation to expanding only existing culverts or pipes, FTA listed both examples in the CE language in order to avoid confusion for practitioners, as suggested by the comments received.

The FTA received a comment that suggested the text of the new CE be broadened to read “Preventative maintenance, including safety treatments, to drainage facilities, including culverts and channels...”

The intent of this CE is to focus on rainwater conveyance methods that can be useful in preventing future flooding at transit facilities. The FTA considered the suggestion to include drainage facilities, but FTA interprets drainage facilities to be a broad term that includes rainwater conveyance and treatment; therefore, if the CE language includes “drainage facilities,” the CE would cover a broader range of activities than proposed in the NPRM. Furthermore, FTA re-reviewed the benchmarking examples in the “FTA Section 1318 Substantiation” document, considered past experience and reviewed past EAs and findings of no significant impact in hopes of being able to support the broader language. The FTA does not have sufficient substantiation to cover the broader range of activities and, therefore, is not able to proceed with the proposed change (i.e., adding “to drainage facilities, including”) at this time. If grantees would like to pursue stormwater management activities unconnected to a broader proposal and outside the scope of this CE, FTA recommends considering the use of the CEs at § 771.118(c)(3) or (d).

### Section 771.118(c)(16)

The summary of comments on § 771.118(c)(16), and how they are addressed, is included in the discussion above on the FHWA § 771.117(c)(24) CE.

### **Rulemaking Analyses and Notices**

The Agencies considered all comments received before the close of business on the comment closing date indicated above, and the comments are available for examination in the docket (FHWA-2013-0049) at Regulations.gov. The Agencies also considered comments received after the comment closing date and filed in the docket prior to this final rule.

### **Executive Orders 12866 and 13563 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). The Agencies determined that this action is not a significant regulatory action under section 3(f) of Executive Order 12866 nor is it significant within the meaning of Department of Transportation regulatory policies and procedures (44 FR 11032). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. It is anticipated that the economic impacts of this rulemaking are minimal. The changes to this rule are requirements mandated by MAP-21 to increase efficiencies in environmental review by

making changes in the Agencies' environmental review procedures.

The activities in this final rule add § 771.117(c)(24), (c)(25), (c)(26), (c)(27), (c)(28), (c)(29), and (c)(30) and § 771.118(c)(14), (c)(15), (c)(16), (d)(7), and (d)(8), pursuant to section 1318 of MAP-21, and are inherently limited in their potential to cause significant environmental impacts because the use of the CEs is subject to the unusual circumstances provision in 23 CFR 771.117(b) and 23 CFR 771.118(b), respectively. The CE provisions require appropriate environmental studies, and may result in the reclassification of the NEPA evaluation of the project to an EA or EIS, if the Agencies determine that the proposal involves potentially significant or significant environmental impacts. The program changes in this final rule establish criteria for PCE agreements between State DOTs and FHWA. These agreements further expedite NEPA environmental review for highway projects and enable projects to move more expeditiously through the Federal environmental review process. The PCE changes will reduce the preparation of extraneous environmental documentation and analysis not needed for compliance with NEPA, and will ensure that projects are built in an environmentally responsible manner. The changes contained within this rule will not adversely affect, in any material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency, and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

### **Regulatory Flexibility Act**

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.), the Agencies

must consider whether this final rule would have a significant economic impact on a substantial number of small entities. “Small entities” include small businesses, not for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. The Agencies do not believe this final rule will have a significant economic impact on entities of any size, and the Agencies received no comment in response to our request for any such information in the NPRM. These revisions could expedite environmental review and thus would be less of an impact on small business entities than any current impact on small business entities. Thus, the Agencies determined that this final rule will not have a significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act of 1995**

This final rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$148.8 million or more in any one year (2 U.S.C. 1532).

#### **Executive Order 13132 (Federalism Assessment)**

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The Agencies analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132 and determined that this



action will not have a substantial direct effect on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government, and, therefore, does not have federalism implications. The Agencies also determined that this action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. The NPRM invited State and local governments with an interest in this rulemaking to comment on the effect that adoption of specific proposals may have on State or local governments. No State or local governments provided comments on this issue.

#### **Executive Order 13175 (Tribal Consultation)**

Executive Order 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that “significantly or uniquely affect” Indian communities and that impose “substantial and direct compliance costs” on such communities. The Agencies analyzed this action under Executive Order 13175, and determined that it will not have substantial direct effects on one or more Indian Tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal law.

The Agencies received one comment in response to their request in the NPRM for comments from Indian tribal governments on the effect that adoption of specific proposals might have on Indian communities. One federally recognized Indian Tribe commented that a tribal summary impact statement was in order. The Indian tribe indicated that it was concerned that a shortened review period for evaluation of highway

projects may cause tribal governments hardship. The Indian Tribe also expressed concerns with exempting the highway projects from other laws and allowing states to use State reviews and approval laws and procedures in lieu of Federal laws and regulations.

In their response to the comments, the FHWA reiterated that the rule does not exempt a project that qualifies for a CE from compliance with all other requirements applicable to the action. The Agencies determined that the language adopted in this final rule appropriately balanced the goal of providing flexibility with the need to satisfy the Agencies' environmental review requirements and responsibilities. The Agencies must continue to meet their legal obligations for a project even if the project qualifies for a CE, which includes the Agencies' responsibilities to consult with Tribes. The final rule does not authorize a State to use or rely on State environmental review and approval laws in lieu of the Federal environmental requirements.

The rule does not preempt tribal law. Projects that qualify for CEs must meet the compliance requirements under other laws, including tribal laws if the project will take place within tribal lands. The rule would not impose substantial direct compliance costs on Indian tribal governments. The rule affects the environmental review process of projects that will receive Federal-aid from FHWA or FTA, or that would require an approval from those Agencies. It does not impose requirements on Indian tribal governments other than those that are typical for any other Federal agency grantee. Finally, the rule would not have substantial direct effects on one or more Indian Tribes. The final rule does not increase the burden of review more than what is already expected for these types of projects. Therefore, a tribal summary impact statement is not required.

**Executive Order 13211 (Energy Effects)**

The Agencies analyzed this action under Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” dated May 18, 2001. The Agencies determined that this action is not a significant energy action under the order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

**Executive Order 12372 (Intergovernmental Review)**

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to these programs and were carried out in the development of this rule.

**Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et seq.), no Federal agency shall conduct or sponsor a collection of information unless in advance the agency has obtained approval by and a control number from the Office of Management and Budget (OMB), and no person is required to respond to a collection of information unless it displays a valid OMB control number. The Agencies determined that this final rule does not contain collection of information requirements for the purposes of the PRA.

**Executive Order 12988 (Civil Justice Reform)**

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

**Executive Order 12898 (Environmental Justice)**

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a) (77 FR 27534) require DOT agencies to achieve environmental justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations in the United States. The DOT Order requires DOT agencies to address compliance with the Executive Order and the DOT Order in all rulemaking activities. In addition, both Agencies have issued additional documents relating to administration of the Executive Order and the DOT Order. On June 14, 2012, the FHWA issued an update to its EJ order (FHWA Order 6640.23A, FHWA Actions to Address Environmental Justice in Minority Populations and Low Income Populations (available online at [www.fhwa.dot.gov/legregs/directives/orders/664023a.htm](http://www.fhwa.dot.gov/legregs/directives/orders/664023a.htm))). The FTA also issued an update to its EJ policy on July 17, 2012 (FTA Policy Guidance for Federal Transit Recipients (available online at [www.fta.dot.gov/legislation\\_law/12349\\_14740.html](http://www.fta.dot.gov/legislation_law/12349_14740.html))).

The Agencies evaluated this final rule under the Executive Order, the DOT Order, the FHWA Order, and the FTA Circular. The Agencies determined that designation of

the new CEs and establishing procedures for PCE agreements through this rulemaking will not cause disproportionately high and adverse human health and environmental effects on minority or low income populations. This rule simply adds a provision to the Agencies' NEPA procedures under which they may decide in the future that a project or program does not require the preparation of an EA or EIS. The rule itself has no potential for effects until it is applied to a proposed action requiring approval by the FHWA or FTA.

At the time the Agencies apply a CE established by this rulemaking, the Agencies have an independent obligation to conduct an evaluation of the proposed action under the applicable EJ orders and guidance. The adoption of this rule does not affect the scope or outcome of that EJ evaluation nor does the new rule affect the ability of affected populations to raise any concerns about potential EJ effects at the time the Agencies consider applying a new CE. Indeed, outreach to ensure the effective involvement of minority and low income populations where there is potential for EJ effects is a core aspect of the EJ orders and guidance. For these reasons, the Agencies also determined that no further EJ analysis is needed and no mitigation is required in connection with the designation of the CEs and procedures for PCE agreements.

#### **Executive Order 13045 (Protection of Children)**

The Agencies analyzed this action under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. The Agencies certify that this action will not cause an environmental risk to health or safety that may disproportionately affect children.

### **Executive Order 12630 (Taking of Private Property)**

The Agencies analyzed this final rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights and determined the rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630.

### **National Environmental Policy Act**

This action will not have any effect on the quality of the human environment and does not require analysis under NEPA. Agencies are required to adopt implementing procedures for NEPA that establish specific criteria for, and identification of, three classes of actions: those that normally require preparation of an EIS; those that normally require preparation of an EA; and those that are categorically excluded from further NEPA review. The CEQ's requirements for establishing Agency NEPA procedures are set forth at 40 CFR 1505.1 and 1507.3. The CEQ regulations do not direct agencies to prepare a NEPA analysis or document before establishing Agency procedures (such as this regulation) that supplement the CEQ NEPA regulations. The CEs are one part of those agency procedures (40 CFR 1507.3(b)), and therefore establishing CEs or allowing for programmatic approaches to processing CEs does not require preparation of a NEPA analysis or document. Agency NEPA procedures are generally procedural guidance to assist agencies in the fulfillment of agency responsibilities under NEPA, but are not the agency's final determination of what level of NEPA analysis is required for a particular proposed action. The determination that establishing CEs does not require NEPA analysis and documentation was upheld in Heartwood, Inc. v. U.S. Forest Service, 73 F.

Supp. 2d 962, 972-73 (S.D. Ill. 1999), aff'd, 230 F.3d 947, 954-55 (7th Cir. 2000).

### **Regulation Identification Number**

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

### **List of Subjects**

#### **23 CFR Part 771**

Environmental protection, Grant programs—transportation, Highways and roads, Historic preservation, Public lands, Recreation areas, Reporting and record keeping requirements.

#### **49 CFR Part 622**

Environmental impact statements, Grant programs—transportation, Public transit, Public transportation, Recreation areas, Reporting and record keeping requirements.

In consideration of the foregoing, the Agencies are amending title 23, Code of Federal Regulations part 771, and title 49, Code of Federal Regulations part 622, as follows:

### **Title 23**

#### **PART 771—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES.**

1. The authority citation for part 771 is revised to read as follows:

**Authority:** 42 U.S.C. 4321 *et seq.*; 23 U.S.C. 106, 109, 128, 138, 139, 315, 325, 326, and 327; 49 U.S.C. 303; 40 CFR Parts 1500-1508; 49 CFR 1.81, 1.85, and 1.91; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; Pub. L. 112-141, 126 Stat. 405, sections 1315, 1316, 1317, and 1318.

2. Amend §771.117 by:

- a. Adding paragraphs (c)(24) through (30);
- b. Revising paragraph (d) introductory text;
- c. Removing and reserving paragraphs (d)(1) through (3);
- d. Adding paragraph (d)(13);
- e. ,Redesignating paragraph (e) as paragraph (f);
- f. Adding new paragraph (e); and
- d. Adding paragraph (g).

The additions and revisions read as follows:

**§ 771.117 FHWA categorical exclusions.**

\* \* \* \* \*

(c) \* \* \*

(24) Localized geotechnical and other investigation to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(25) Environmental restoration and pollution abatement actions to minimize or mitigate the impacts of any existing transportation facility (including retrofitting and



construction of stormwater treatment systems to meet Federal and State requirements under sections 401 and 402 of the Federal Water Pollution Control Act (33 U.S.C. 1341; 1342)) carried out to address water pollution or environmental degradation.

(26) Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, adding shoulders, or adding auxiliary lanes (including parking, weaving, turning, and climbing lanes), if the action meets the constraints in paragraph (e) of this section.

(27) Highway safety or traffic operations improvement projects, including the installation of ramp metering control devices and lighting, if the project meets the constraints in paragraph (e) of this section.

(28) Bridge rehabilitation, reconstruction, or replacement or the construction of grade separation to replace existing at-grade railroad crossings, if the actions meet the constraints in paragraph (e) of this section.

(29) Purchase, construction, replacement, or rehabilitation of ferry vessels (including improvements to ferry vessel safety, navigation, and security systems) that would not require a change in the function of the ferry terminals and can be accommodated by existing facilities or by new facilities which themselves are within a CE.

(30) Rehabilitation or reconstruction of existing ferry facilities that occupy substantially the same geographic footprint, do not result in a change in their functional use, and do not result in a substantial increase in the existing facility's capacity. Example actions include work on pedestrian and vehicle transfer structures and associated utilities,

buildings, and terminals.

(d) Additional actions which meet the criteria for a CE in the CEQ regulations (40 CFR 1508.4) and paragraph (a) of this section may be designated as CEs only after Administration approval unless otherwise authorized under an executed agreement pursuant to paragraph (g) of this section. The applicant shall submit documentation which demonstrates that the specific conditions or criteria for these CEs are satisfied and that significant environmental effects will not result. Examples of such actions include but are not limited to:

\* \* \* \* \*

(13) Actions described in paragraphs (c)(26), (c)(27), and (c)(28) of this section that do not meet the constraints in paragraph (e) of this section.

(e) Actions described in (c)(26), (c)(27), and (c)(28) of this section may not be processed as CEs under paragraph (c) if they involve:

(1) An acquisition of more than a minor amount of right-of-way or that would result in any residential or non-residential displacements;

(2) An action that needs a bridge permit from the U.S. Coast Guard, or an action that does not meet the terms and conditions of a U.S. Army Corps of Engineers nationwide or general permit under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899;

(3) A finding of “adverse effect” to historic properties under the National Historic Preservation Act, the use of a resource protected under 23 U.S.C. 138 or 49 U.S.C. 303 (section 4(f)) except for actions resulting in de minimis impacts, or a finding

of “may affect, likely to adversely affect” threatened or endangered species or critical habitat under the Endangered Species Act;

(4) Construction of temporary access, or the closure of existing road, bridge, or ramps, that would result in major traffic disruptions;

(5) Changes in access control;

(6) A floodplain encroachment other than functionally dependent uses (e.g., bridges, wetlands) or actions that facilitate open space use (e.g., recreational trails, bicycle and pedestrian paths); or construction activities in, across or adjacent to a river component designated or proposed for inclusion in the National System of Wild and Scenic Rivers.

\* \* \* \* \*

(g) FHWA may enter into programmatic agreements with a State to allow a State DOT to make a NEPA CE certification or determination and approval on FHWA’s behalf, for CEs specifically listed in paragraphs (c) and (d) of this section. Such agreements must be subject to the following conditions:

(1) The agreement must set forth the State DOT’s responsibilities for making CE determinations, documenting the determinations, and achieving acceptable quality control and quality assurance;

(2) The agreement may not have a term of more than five years, but may be renewed;

(3) The agreement must provide for FHWA’s monitoring of the State DOT’s compliance with the terms of the agreement and for the State DOT’s execution of any

needed corrective action. FHWA must take into account the State DOT's performance when considering renewal of the programmatic CE agreement; and

(4) The agreement must include stipulations for amendment, termination, and public availability of the agreement once it has been executed.

3. Amend § 771.118 by adding paragraphs (c)(14) through (16) and adding paragraphs (d)(7) and (8) to read as follows:

**§ 771.118 FTA categorical exclusions.**

\* \* \* \* \*

(c) \* \* \*

(14) Bridge removal and bridge removal related activities, such as in-channel work, disposal of materials and debris in accordance with applicable regulations, and transportation facility realignment.

(15) Preventative maintenance, including safety treatments, to culverts and channels within and adjacent to transportation right-of-way to prevent damage to the transportation facility and adjoining property, plus any necessary channel work, such as restoring, replacing, reconstructing, and rehabilitating culverts and drainage pipes; and, expanding existing culverts and drainage pipes.

(16) Localized geotechnical and other investigations to provide information for preliminary design and for environmental analyses and permitting purposes, such as drilling test bores for soil sampling; archeological investigations for archeology resources assessment or similar survey; and wetland surveys.

(d) \* \* \*

(7) Minor transportation facility realignment for rail safety reasons, such as improving vertical and horizontal alignment of railroad crossings, and improving sight distance at railroad crossings.

(8) Modernization or minor expansions of transit structures and facilities outside existing right-of-way, such as bridges, stations, or rail yards.

\* \* \* \* \*

## **Title 49**

### **PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES**

4. The authority citation for part 622 is revised to read as follows:

Authority: 42 U.S.C. 4321 et seq.; 49 U.S.C. 303 and 5323(q); 23 U.S.C. 139 and 326; Pub. L. 109–59, 119 Stat. 1144, sections 6002 and 6010; 40 CFR parts 1500–1508; 49 CFR 1.81; and Pub. L. 112-141, 126 Stat. 405, sections 1315, 1316, 1317, and 1318.

Issued on: September 26, 2014.

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Gregory G. Nadeau,  
Acting Administrator,  
Federal Highway Administration.

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Therese W. McMillan,  
Acting Administrator,  
Federal Transit Administration.

